IN THE
SUPREME COURT OF THE UNITED STATES

_____ Term, 19__

NO. 77-1743

Supreme Court, U.
FILED
JUN 7 1978
MICHAEL RODAK, JR., C

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,

Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE
COURT OF APPEALS OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1978

_____

NO. _____

_____

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,

Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellee.

_____

JURISDICTIONAL STATEMENT

_____

This is an appeal from an order of the Court of Appeals of the State of California, Second Appellate District, entered January 25, 1978, and which became final on March 9, 1978, by reason of the order of the Supreme Court of the State of California denying appellants' petition for hearing on the order of

the Court of Appeals. Appellants seek review of an order of the Superior Court of the State of California, in and for the County of Los Angeles, compelling them to comply with a subpoena duces tecum issued by the Attorney General of the State of California on or about July 22, 1977. This subpoena sought to compel production of the books and records of appellants as they relate to advertisements published by appellants in newspapers in and around Los Angeles, California. The question raised on this appeal is whether the Attorney General can compel production of books and records pertaining to advertisements without any requirement of making a showing whatsoever of a basis for belief that such production will further a legitimate interest of the Attorney General in discharging his official duties. The case presents important issues as to the impact of the doctrine of Commercial Speech on the powers of the state to suppress advertising through regulation.

OPINIONS BELOW

No opinion was rendered by the trial judge of the Superior Court. The order of the Superior Court is set out in the appendix hereto, infra, pp. A7-A10. The order of the Court of Appeals denying appellants' petition for writ of prohibition and/or mandate is unreported, and is reprinted in the appendix hereto, infra, pp. A11-A12.

JURISDICTION

The judgment of the Court of Appeals of the State of California, Second

Judicial District, was entered on January 25, 1978. The appellants filed a timely petition for hearing with the Supreme Court of California which was denied on March 9, 1978. An amended notice of appeal to this Court was duly filed in the Court of Appeals on June 5, 1978. See appendix, pp. A13-A14, infra.

This appeal is being docketed in this Court within ninety (90) days from the denial of hearing in the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). The following cases sustain the jurisdiction of this Court: Bates v. State Bar of Ariziona, ___ U.S. ___, 97 S.Ct. 2691 (1977); Bantam Books, Inc. vs. Sullivan, 372 U.S. 58, 61, n.3 (1963); Michigan-Wisconsin Pipeline Co. vs. Calvert, 347 U.S. 157, 160 (1954).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are set forth in full in the appendix, infra, at pp. A1-A6, as follows:

United States Constitution, Amendment One

United States Constitution, Amendment Fourteen

California Government Code, §§11180, 11187, and 11188

California Business & Professions Code, §17500

QUESTIONS PRESENTED[1]

I. Whether the Attorney General can without the requirement of any showing of reasonable cause compel production of books and records through an administrative subpoena duces tecum where the object of his inquiry is the exercise of rights of Commercial Speech guaranteed under the United States Constitution.

II. Whether California Government Code §§11180, et seq. are constitutionally infirm by investing in the Attorney General of the State of California the power to investigate the exercise of Commercial Speech protected by the First Amendment without any meaningful impartial judicial review.

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1. To the extent that the questions presented are more properly raised by a petition for certiorari, appeallants request that these papers be so treated. 28 U.S.C. §2103.

STATEMENT OF THE CASE

This matter involves an administrative subpoena duces tecum issued by the Attorney General of the State of California on or about August 1, 1977, and directed to appellants herein. That subpoena duces tecum commanded appellants to produce on or before August 15, 1977 certain specified documents, books, records, papers and other items pertaining to statement made by appellants in published advertisements in or around the Los Angeles area.

On August 24, 1977, Harrison W. Hertzberg, of Hertzberg, Kaplan & Koslow, attorneys for appellants herein, appeared before the Deputy Attorney General Herschel T. Elkins, and produced certain specified documents pursuant to said subpoena, and placed into the record

appellants' objections to said subpoena duces tecum with respect to other specified documents. Among the bases for objection, inter alia, was that the administrative subpoena acts to deprive advertisers of due process of law by placing into the undisciplined and unbridled discretion of the Attorney General's Office the ability to require documentation of statements which, in the Attorney General's subjective opinion, appear to him to be false, misleading or deceptive, and that the procedure thereby places into the unreviewed hands of the Attorney General the power to chill speech presumptively protected by the First Amendment.

On October 24, 1977, Evelle J. Younger, Attorney General of the State of California, and appellee herein, petitioned the Superior Court of the State of California for the County of Los Angeles for an order to show cause re subpoena duces tecum, pursuant to the provisions of California Government Code §§11187 and 11188. On November 1, 1977, the Superior Court for said County and Stated ordered an officer of appellants' corporations to show cause why he or other officers of the investigated corporation should not appear before the Attorney General and produce the documents or other items designated in the subpoena duces tecum.

In support of its petition for an order compelling production, the Attorney General made the following showing only: (1) That the Attorney General has authority to investigate whether any untrue or misleading representations have been made by a corporation and whether

any unlawful, unfair, or fraudulent business practices have been perpetuated by a corporation; (2) That the Attorney General has authority to issue investigative subpoenas to obtain information reasonably relevant to any authorized investigation; (3) That the Attorney General can delegate authority; and (4) That there has been a proper delegation of authority from the Attorney General to the investigators in this case. No showing was made whatsoever, by affidavit or by representation, that the Attorney General had any cause to believe that the appellant corporations were in fact practicing any unlawful, unfair, or fraudulent business practices.

Appellants' filed response with the Superior Court, arguing, as appellants argue herein, that the Attorney General's production demand violated appellants' rights under the First and Fourteenth Amendments.

A hearing was thereafter held before a judge of the Superior Court, and on December 12, 1977, the Superior Court judge issued an order in this matter. The Court found that the subpoena duces tecum had been regularly issued and served, and ordered appellants to appear before the Attorney General within fifteen (15) days after a final order of any appellate court to which appeal may be taken from the order of the Superior Court, and at that time to produce documents and other items designated in the subpoena duces tecum.

On January 5, 1978, appellants filed a petition for writ of prohibition and/or writ of mandate with the Court of Appeal for the State of California,

Second Appellate Division, seeking an order directing the Superior Court to desist and refrain from directing production under the subpoenas. This petition was denied by the Court of Appeals on January 25, 1978. Petition for hearing before the Supreme Court of California was denied March 9, 1978.

THE QUESTIONS ARE SUBSTANTIAL

The Subpoenas Issued by the Attorney General Violate Appellants' Rights Under the First Amendment in that They Compel Production of Documents and Things Related to Appellants' Exercise of First Amendment Rights and Yet Fail Entirely to Meet Minimal the Constitutional Requirement of Having Been Issued Upon Reasonable Cause or With a Meaningful Opportunity for Judicial Review.

This case involves a basic and fundamental, yet undecided, issue concerning the powers of the executive branch to restrain and chill the exercise of liberties guaranteed under the First Amendment through the issuance of administrative subpoenas duces tecum. The factual question presented is whether the Attorney General can compel production of books and records pertaining to advertisements published in newspapers throughout California without the requirement of making any showing whatsoever of any basis for belief that such production will further some legitimate interest of the Attorney General in discharging his official duties. The legal question presented involves the impact of the doctrine of commercial speech on the

powers of the State to suppress advertising through regulation. Where the First Amendment is involved, must not the Attorney General in issuing its administrative subpoenas substantiate before a Court of law some factual basis for its interest in the matters investigated? If the mere whim or curiosity of the Attorney General alone suffices to issue broad and sweeping administrative subpoenas, will not the executive branch be able to accomplish indirectly what has been forbidden to the legislature, the suppression of Commercial Speech?

There is hardly need for citation to this Court of the emerging constitutional principle that advertising, commercial speech, is presumptively protected by the First Amendment no less than any other form of speech. See, e.g., Bates vs. State Bar of Ariziona, ___ U.S. ___, 97 S.Ct. 2691 (1977); Linmark Associates, Inc. vs. Township of Willingboro, ___ U.S. ___, 97 S.Ct. 1614 (1977); Bigelow vs. Virginia, 421 U.S. 809 (1975). Appellants submit that the order of the Superior Court compelling production and the grounds upon which it is based must be judged in light of the familiar principles of First Amendment law applicable to such production orders.

This Court has long recognized that the First Amendment places limitations on the powers of the Government to conduct investigative activities. De Gregory vs. Attorney General, 383 U.S. 835 (1965); Sweezy vs. New Hampshire, 354 U.S. 234 (1967); United States vs. Rumely, 344 U.S. 41 (1953).

These decisions rest upon the practical consideration that if government investigations were shielded from First Amendment scrutiny, the executive branch could, under the pretense of "enforcing" the law, bypass the constitutional restrictions placed on the legislature. United States vs. Rumely, supra, 344 U.S. at 58.

Where First Amendment rights would be infringed or thwarted by an investigation, whether by Congress, a state administrative body, or a Grand Jury, the Government has a heavy burden to show the necessity for such investigation before a Court may issue an order compelling production of information. That burden is not met unless the Government establishes each element of a three-part test: That its interest in the subject matter of the investigation is (1) "immediate, substantial, and subordinating," (2) that there is a "substantial connection" between the information it seeks to compel the witness to supply and the overriding governmental interests in the subject matter of the investigation, and (3) that the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interests. Gibson vs. Florida Legislative Investigation Comm., 372 U.S. at 551, 557 (1963). Accord, United States vs. Brusey, 466 F.2d 1059, 1083 (9th Cir. 1972).

The decisions setting forth these very strict standards involved, it must be conceded, investigations of highly sensitive First Amendment matters, such as political and social speech. However, acknowledging this, the question still remains whether the First Amendment

should not be deemed to impose some constitutional restraint on the issuance of subpoenas duces tecum by administrative agencies when the object of investigation is advertising presumtively protected under the Commercial Speech doctrine.

Several lower federal courts have now recognized that advertising cannot be regulated without judicially supervised procedural standards to ensure First Amendment rights are not impaired. F.T.C. vs. Simeon Management Corp., 532 F.2d 708 (9th Cir. 1976), Beneficial Corp. vs. F.T.C., 542 F.2d 611 (3rd Cir. 1976), cert. den. 45 U.S.L.W. 3705 (April 25, 1977), Anderson, Clayton & Co. vs. Washington St. Dept. of Agric., 402 F. Supp. 1253 (W.D. Wash. 1975). These decisions recognize that although the First Amendment does not prohibit the state from investigating potentially false advertising, it is not true that the First Amendment does not inhibit the state's regulatory activity.

In this matter, the procedure below is faulted on two independent constitutional grounds: (1) That the statutory provisions under which the subpoenas were issued are defective in that they fail to require a showing that the Government has any reasonable grounds compelling production of the materials sought by the subpoenas, and (2) That the statutes are further infirm in that they invest in the Attorney General the power to investigate protected expression without any meaningful impartial judicial review.

At issue are California Government Code §§11180, et seq., appended hereto, which authorize the Attorney General or his deputy to investigate "violations

of any law." Government Code §11180(b). In connection with such investigations, the Attorney General is authorized to issue subpoenas duces tecum. Government Code §11180(e).

In the event a witness refuses to testify or produce, the Attorney General may petition the Superior Court of the county for which the investigation is being conduct for an order compelling the person to attend and testify or produce the subpoenaed papers. Government Code §11187. The grounds for review by the Superior Court are set forth at Government Code §11188. Under that statute, the extent of the inquiry before the Superior Court is whether the "subpoena was regularly issued by the head of the department . . ." Government Code §11188. If the Court so finds, the Court is mandated to enter an order compelling the person to appear and testify or produce. Government Code §11188.

This statutory scheme places in the hand of the Attorney General the unbridled discretion to investigate for any reason any matter that, in the opinion of the Attorney General, might be relevant in a loose sense to some violation of law. It is submitted that the time has come for this Court for recognize a further constitutional limitation placed upon the Attorney General's powers by operation of the First Amendment. Specifically, the incorporation of advertising into the area of protected speech compels that some showing be made by the Attorney General to the Superior Court before he may trench upon the exercise of commercial speech rights through his investigative powers.

Because the Government Code sets forth no such required showing, its provisions are constitutionally infirm, and should be interpreted by this Court to require the necessary constitutional showing.

In this matter, no such showing was made by the Attorney General. The Attorney General did not present any evidence of consumer complaints or customer dissatisfaction. Nor did it present evidence of any field investigation of scientific analysis of survey which could cast doubt on statements made in the advertisements. Rather, the record is devoid of any factual indication that the advertisements under investigation may be in any way misleading or false. On such a record, it is submitted, it was a violation of appellants' rights to compel production of their books and papers.

Apart from the lack of any such showing, the statutory scheme further runs afoul of the requirements of the First Amendment by failing to provide for a meaningful judicial review of the Attorney General's subpoena. Under the provisions of Government Code §11188, the extent of the inquiry of the Superior Court upon reviewing the Attorney General's petition for an order to compel production is limited to determining whether "the subpoena was regularly issued by the head of the department." In effect, this statutory scheme requires the Court to accede to the Attorney General's demand for production. No limitation is placed upon this by state law, save a weak requirement of reasonableness under the Fourth Amendment. Brovelli vs. Superior Court, 56 Cal.2d 524 (1961).

It is more than well established that First Amendment challenges to investigative proceedings are entitled to an independent judicial determination. United States vs. Bursey, supra, 466 F.2d at 1083; see also, Silverthorne Lumber Co. vs. United States, 251 U.S. 385 (1920). Because the Government Code nowhere provides for a judicial review of the Attorney General's investigations giving due regard for the First Amendment freedoms involved, the statutory scheme in question is constitutionally infirm, and must either be struck down by this Court, or deemed to require such judicial hearing. The order presently before this Court, which was issued pursuant to that scheme, is therefore contrary to these constitutional requirements.

It must be clear that the suppression of commercial speech can be effected by vesting an unbridled investigative power in the Attorney General. Under California law, the investigations of the Attorney General need not be based upon any reasonable suspicion or indeed any grounds whatsoever. Brovelli, supra, 56 Cal.2d 524. Appellants submit that these statutes cannot survive the advent of the Commercial Speech Doctrine. In all other fields of government investigation, whether by agency, Congress, or the Grand Jury, the Courts have found it necessary to place upon the investigating agency the burden of showing some justification for the inquiry where the effect of the investigation may be to stifle or chill the exercise of First Amendment rights. Appellants urge this Court to recognize that the investigative activities of the Attorney General should not be treated any differently than those of other govern-

mental bodies. Appellants submit that the requirements of the First and Fourteenth Amendments have not been satisfied and that the order of the Court of Appeals of the State of California, from which this appeal is taken, affirming production under that statutory scheme is contrary to the requirements of the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal, or in the alternative, grant a writ of certiorari to review the judgment below.

Dated: June 5, 1978.

Respectfully submitted,

HERTZBERG, KAPLAN & KOSLOW

BY: _____
HARRISON W. HERTZBERG
Attorneys for
Appellants

APPENDIX

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION,

AMENDMENT ONE:

Congress shall make no law ... abridging the freedom of speech, of of the press; ... ."

UNITED STATES CONSTITUTION,

AMENDMENT FOURTEEN:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

CALIFORNIA GOVERNMENT CODE §11180

"SUBJECTS OF INVESTIGATIONS AND ACTIONS. The head of each department may make investigations and prosecute actions concerning:

(a) All matters relating to the business activities and subjects under the jurisdiction of the department.

(b) Violations of any law or rule or order of the department.

(c) Such other matters as may be provided by law."

CALIFORNIA GOVERNMENT CODE §11187

"WITNESSES; PETITION TO COMPEL ATTENDANCE, ETC.; CONTENTS. If any witness refused to attend or testify or produce any papers required by such

subpena the head of the department may petition the superior court in the county in which the hearing is pending for an order compelling the person to attend and testify or produce the papers required by the subpena before the officer named in the subpena.

The petition shall set forth that:

(a) Due notice of the time and place of attendance of the person or the production of the papers has been given.

(b) The person has been subpenaed in the manner prescribed in this article.

(c) He has failed and refused to attend or produce the papers required by subpena before the officer in the cause or proceeding named in the subpena, or has refused to answer questions propounded to him in the course of the investigation or hearing."

CALIFORNIA GOVERNMENT CODE §11188.

"WITNESSES; ORDER TO SHOW CAUSE; ORDER TO APPEAR, ETC.; CONTEMPT. Upon the filing of the petition the court shall enter an order directing the person to appear before the court at a specified time and place and then and there show cause why he has not attended or testified or produced the papers as required. A copy of the order shall be served upon him. If it appears to the court that the subpena was regularly issued by the head of the department, the court shall enter an order that the person appear before the officer named in the subpena at the time and place fixed in the order and testify or produce the required papers. Upon failure to obey the order, the person shall be dealt with as for contempt of court."

CALIFORNIA BUSINESS AND PROFESSIONS CODE §17500.

"FALSE OR MISLEADING STATEMENT.

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real

or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding

two thousand five hundred dollars ($2,500), or by both.

OPINIONS BELOW

ORDER OF SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, DECEMBER 12, 1972.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

In the Matter of the Investigation of:

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET

CASE NO. C 218171

ORDER

The hearing on the Order to Show Cause was held before the Honorable George M. Dell, Judge Presiding in Department 88 on December 9, 1977.

Petitioner, Evelle J. Younger, Attorney General of the State of California, appeared through Michael R. Botwin, Deputy Attorney General. Respondent, Nicholas Shammas, appeared through his attorneys, Hertzberg, Kaplan & Koslow, by Harrison W. Hertzberg and Don E. Franzen.

The court having found that the subpoena duces tecum was regularly issued and served upon respondent and after considering the written and oral arguments presented by petition and respondent, and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Nicholas Shammas or any other appropriate officer of the corporations whose records have been subpoenaed shall appear before the Attorney General of

the State of California or his duly authorized representative at 3580 Wilshire Boulevard, 6th Floor, Los Angeles, California, on the 6th day of January, 1978, at the hour of 10:00 a.m. and then and there produce the documents, books, records, papers and other items designated in the subpoena duces tecum, which was issued by Deputy Attorney General Michael R. Botwin on August 1, 1977, in the above matter. Nicholas Shammas or any other appropriate officer of said corporations shall mark each file with the number corresponding to the respective item number in the subpoena duces tecum.

2. If respondent files a request for an extraordinary writ on or before January 6, 1978, the effective date of this order will be stayed and respondent need not comply with the provisions

set forth in paragraph 1 above until 15 days after a final ruling on such application for appellate relief. If the order is stayed by the seeking of appellate review, the date for the production of the subpoenaed documents shall be set by stipulation. In the event that the parties fail to agree on a mutually convenient time, the documents shall be produced at the Attorney General's Office, 3580 Wilshire Boulevard, 6th Floor, Los Angeles, California, at 10:00 a.m. on the 15th day after this order becomes final, or in the event that the 15th day is not a court date, said documents shall be produced on the next succeeding court date.

DATE: Dec 12, 1977

/s/ George M. Dell
GEOGE M. DELL
Judge of the Superior Court

ORDER OF COURT OF APPEALS, SECOND APPELLATE DISTRICT, JANUARY 25, 1978

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPEALLTE DISTRICT

DIVISION THREE

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT - FELIX CHEVROLET,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Real Party in Interest.

2D CIVIL NO. 52705

ORDER

THE COURT:

The petition for writ of prohibition and/or mandate, filed herein on January 5, 1978, has been read and considered. The petition is denied for failure to state facts sufficient to justify the relief sought.

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

SECOND APPEALLATE DISTRICT

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,

Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellee.

CASE NO. 2-CIV. 52705

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appellants above named, hereby appeal to the Supreme Court of the United States from the judgemnt/decree of the Court of Appeal of the State of California,

denying petition for hearing herein, entered in this action on January 25, 1978, and which became final by reason of the denial of hearing in the Supreme Court of the United States of California, March 9, 1978.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: JUNE 5, 1978

HERTZBERG, KAPLAN & KOSLOW

/s/ DON ERIK FRANZEN
BY: DON ERIK FRANZEN
ATTORNEYS FOR APPELLANTS

(PROOF OF SERVICE BY MAIL -
1013, 1013a C.C.P. (2), 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY MAIL BY ATTORNEY

I, HARRISON W. HERTZBERG, being first duly sworn, say that I am and was at all times herein mentioned, a citizen of the United States, employed in the County aforesaid, and over the age of 18 years; I further say that I am an active member of the State Bar of California, counsel in this cause, and not a party thereto.

My business address is 3550 Wilshire Boulevard, Suite #1418, Los Angeles, California 90010.

That on June 6, 1978, I served the within JURISDICTIONAL STATEMENT on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at 3550 Wilshire Boulevard, Los Angeles, California 90010 addressed as follows:

Attorney General Evelle J. Younger, Michael R. Botwin, Deputy Attorney General, 3580 Wilshire Boulevard, Los Angeles, CA 90010;

Court of Appeal, Second Appellate District, 3580 Wilshire Blvd., Room 301, Los Angeles, CA 90010;

California State Supreme Court, 3580 Wilshire Blvd., Los Angeles, CA 90010;

HARRISON W. HERTZBERG

Subscribed and sworn to before me this 6th day of June, 1978.

OFFICIAL SEAL
MINA QUEZADA
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 27, 1981

Mina Quezada
Notary Public in and for the said County and State.

Supreme Court, U. S.
FILED
JUL 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1743

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,

Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1978
No. .....

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,
Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Appellee.

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Superior Court of the State of California for the County of Los Angeles, on the grounds that appellant has not presented a substantial federal question and on the grounds that the question raised by the appellant is so unsubstantial as not to need further argument.

Question Presented

Whether California Government Code sections 11180, 11187 and 11188 which allow the Attorney General to investigate the business activities of the appellant corporations and which require said corporations to produce corporate records pursuant to that investigation are in violation of the United States Constitution?

Statement of the Case

Following a hearing on an order to show cause, the Superior Court of the State of California for the County of Los Angeles, on December 12, 1977, ordered Nicholas Shammus or another appropriate officer of appellant corporation to produce documents subpoenaed by the Attorney General. Appellants filed a Petition for Writ of Prohibition and/or Writ of Mandate in the Court of Appeal of the State of California, Second Appellate District, seeking to halt enforcement of the order of Superior Court. The petition was denied without opinion. Appellants sought a hearing in the California Supreme Court. The hearing was denied without opinion. Appellants then filed an appeal to this court.

ARGUMENT

State Statutes Allowing the Attorney General to Inspect Corporate Records Pursuant to an Investigation Without First Making a "Good Cause" Showing That the Company Whose Records Are Being Examined Is in Violation of California Law Are Not Constitutionally Invalid

The appellants contend that the United States Constitution does not allow the Attorney General to compel production of books and records pertaining to advertisements of the company (Plaintiff's Appeal p. 8). Plaintiffs erroneously contend that this issue has not been decided by the federal courts (Plaintiff's Appeal p. 8). In fact, the appellants' position has been rejected by this court and by various federal and state courts for many years. In *United States v. Morton Salt Co.* 338 U.S. 632, 642, 643 (1949), this court stated,

"The only power that is involved here is the power to get information from those who best can give it and who are most interested in doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

> When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law."

This court has never varied from that view. *See United States v. Powell* (1964) 379 U.S. 48, 57. The same views are found in the California appellate courts. *See Brovelli v. Superior Court* (1961) 56 Cal.2d 524, 529; *People v. West Coast Shows, Inc.* (1970) 10 Cal.App.3d 462, 468; *Fielder v. Berkeley Properties Co.* (1972) 23 Cal.App.3d 30, 38. Similar expressions concerning authority to investigate are bound in federal appellate decisions. *See F.T.C. v. Texaco, Inc.* (1977) 555 F.2d 862, 872; *Link v. N.L.R.B.* (1964) 330 F.2d 437; *DeMasters v. Arend* (1963) 313 F.2d 79, 88-90; *F.T.C. v. Standard American, Inc.* (1962) 306 F.2d 231, 234; *Application of Barnes* (1955) 219 F.2d 137, 143. The appellant cites no cases that question this court's ruling in *United States v. Morton Salt Co.* or the other cases cited above.

Although it is difficult to determine the exact nature of the argument made by the appellants, they seem to be saying that their advertising constitutes speech, that the speech is protected by the First Amendment and that therefore the Attorney General has no authority over an investigation of such advertising. As this court stated in *Va. Pharmacy Bd. v. Va. Consumer Council* (1975) 425 U.S. 748, 771-772,

> "Untruthful speech, commercial or otherwise, has never been protected for its own sake. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974); Konigsberg v. State Bar, 366 U.S. 36, 49 and n. 10, 6

> L.Ed.2d 105, 81 S.Ct. 997 (1961). Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We forsee no obstacle to a State's dealing effectively with this problem. [footnote omitted] The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."

Although this court has sought to restrict bans on advertising, it certainly has not insulated all commercial speech from examination. In *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383, this court held:

> "Advertising that is false, deceptive, or misleading of course is subject to restraint. *See Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. at 771-772, and n.24. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness discourage protected speech. Id., at 771-772, n.24. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. [citations]."

Appellants do not challenge the Attorney General's authority to bring appropriate action for false advertising or for unfair business practices. This court in

Va. Pharmacy Bd. v. Va. Consumer Council, supra, and *Bates v. State Bar of Arizona, supra,* recognizes the State's responsibility and authority to prevent such false advertising. Investigations, including subpoena of documents, to determine the existence of false advertising or unfair business practices are clearly recognized as an acceptable method of discovery. Appellants have pointed to no irregularity or impropriety in the form of the subpoena and have failed to attempt to distinguish or even to mention *United States v. Morton Salt Co., supra,* although they were made aware of that case in the proceedings below.

Conclusion

Appellants in their unnumbered appeal set forth no substantial federal question and the arguments that are made by appellants are so unsubstantial as not to need further argument.

For the reasons set forth above, it is respectfully requested that the motion to dismiss or affirm be granted.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

MICHAEL BOTWIN,
Deputy Attorney General,

By MICHAEL BOTWIN,
Deputy Attorney General,

Attorneys for Appellee.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1978.

_____

_____

Supreme Court, U. S.
FILED
JUL 17 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 77-1743

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,

Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellee.

REPLY TO MOTION TO DISMISS OR AFFIRM

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CONSTITUTION

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 77-1473

DOWNTOWN L.A. MOTORS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,

Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellee.

REPLY TO MOTION
TO DISMISS OR AFFIRM

The First And Fourteenth Amendments Must Be Deemed To Require Some Showing On The Part Of A State Investigatory Agency Before It Can Compel Production Of Documents As Part Of An Investigation That Touches Upon The Exercise Of Rights Of Commercial Speech.

Appellee's Motion to Dismiss or Affirm characterizes the issue on this appeal as merely involving the acknowleged power of an investigatory agency to compel production of books and records as

part of its legitimate investigatory duties. Appellee's statement of the issue fails to come to grips with appellants' contention on this appeal. Briefly restated, appellants submit for review by this Court the question of whether the recent incorporation of Commercial Speech within the First Amendment does not bear implication as to the scope of the government's investigatory powers. Appellants argue that the rationale of this Court's work in the area of the First Amendment compels by logical implication the conclusion that the power of government to investigate Commercial Speech must be constitutionally limited to some extent. Appellants contend that this limitation must include, at the least, the requirement of some showing on the part of the investigatory agency of a reason to believe that the party investigated may have violated some applicable law or regulation relating to advertising.

Appellee cites in support of his Motion to Dismiss or Affirm the decision of United States v. Morton Salt Co., 338 U.S. 623 (1949). That case involved the issue of the power of an administrative agency to compel production of records as part of its investigative functions, with nothing more. No First Amendment issues were present in the Morton Salt case.

Appellants acknowledge the general rule set forth in Morton Salt, but submit that the inquiry cannot end there. For,

> "[T]he power to investigate is only an adjunct of the power to legislate - an auxillary power 'necessary and appropriate to that end.' . . . When

> the constitutional limits of law making are passed, investigation is out of bound, ... For it misses the whole point of our constitutional history to assume that 'government,' or any other branch of government, somehow has rights and powers of its own apart from those necessarily attending the proper performance of its constitutional functions." [citations omitted]
>
> Gibson v. Florida Legislative Investigation Com., 372 U.S. 539, 561-62 (1963) (Douglas, J. concurring).

Acting on this principal, this Court, and lower federal courts, have repeatedly held that the power of investigation, whether exercised by the Congress, the executive, or even by the Grand Jury, must be placed under constitutional limitation where the object of the investigation are matters protected by the First Amendment. DeGregory v. Attorney General, 383 U.S. 835 (1966); Gibson v. Florida Legislative Investigation Co., supra.; Sweezy v. New Hampshire, 354 U.S. 234 (1957); United States v. Rumely, 344 U.S. 41 (1953); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

These cases recognize the practical concern that the power to investigate, if unchecked, may amount to the power to suppress. See, e.g., United States v. Rumely, supra., 344 U.S. at 58. This Court has now established that advertising, Commercial Speech, cannot directly be suppressed by the State. The question presented by this appeal is whether the State may be deemed to have an indirect

power to suppress Commercial Speech in the form of an unchecked and unbridled power to investigate.

In the context of highly sensitive First Amendment areas, such as membership lists in associations, newspaper reporting or political leafleting, this Court has imposed a "heavy burden" on the government to establish that its interest in the subject of the investigation is "immediate, substantial and subordinating," that there is a "substantial connection" between the information it seeks and the overriding governmental interest in the subject matter, and that the means of obtaining the information is no more drastic than is necessary to forward the asserted governmental interest. Gibson v. Florida Legislative Investigation Com., supra., 372 U.S. at 551, 557; accord, Bursey v. United States, supra., 466 F.2d at 1083.

Appellants do not contend that the same burden must be placed on the investigating agency where the object of investigation is Commercial Speech. Recognizing the "commonsense differences" between Commercial Speech and other more sensitive First Amendment areas, Va. St. Bd. of Pharm. v. Va. Cit. Const. Council, 425 U.S. 748, 771, n. 24 (1976), appellants argue that a less stringent showing may be all that is constitutionally mandated. But, appellants strongly urge that it would be inconsistent with this Court's work in the host of cases now recognizing the protected status of Commercial Speech to permit investigations that such as that at issue merely upon the whim or caprice of the investigating agency. Such a rule opens the investigation to abuse and potentially to the suppression of

First Amendment rights. Such "unbridled discretion" should not be allowed to devolve "upon executive and administrative officers. . ." See Marshall v. Barlow's, Inc., ___ U.S. ___, 98 S.Ct. 1816, 1825-26 (1978).

Appellees rely on this Court's statement that "false" advertising as such is not subject to First Amendment protection. See Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977). Yet this is not a reason for permitting all investigation of advertising without regard to constitutional limitation. Appellee might as well argue that because obscenity is not protected by the First Amendment, the State's investigation of book publishing activities is not subject to constitutional restraint. Such an argument is invalid because it assumes the question at issue: whether or not the particular activity in question, be it book publishing or advertising, is in fact such as to fall outside the realm of constitutional protection. See Marcus v. Search Warrant, 367 U.S. 717, 719 (1961).

Fortunately, lower federal courts have not accepted appellee's facile reasoning. As noted in appellants' jurisdictional statment, a growing number of lower federal court decisions recognizes that although the First Amendment does not prohibit the State from controlling false or deceptive advertising the First Amendment nonetheless imposes limits on the State's regulatory powers. See Beneficial Corp. v. F. T. C., 542 F.2d 611 (3rd Cir. 1976), Cert. Den. ___ U.S. ___ (1977); F. T. C. v. Simeon Management Corp., 532 F.2d 708 (9th Cir. 1976); Anderson, Clayton & Co. v. Washington St. Dept. of Agric., 402 F.Supp. 1253 (W.D.Wash. 1975).

Appellants contend that the competing interests of the State to control deceptive or false advertising and of the public to an open and continuing flow of information through advertising can only be accommodated by limiting the State's power of investigation to those cases where there is some reasonable grounds in fact to believe that the advertising may be false or deceptive. Such a showing would not place an impossible burden on the State, but instead would militate against unnecessary investigations that tend only to suppress and chill the exercise of First Amendment rights. See Watkins v. United States, 354 U.S. 1978, 208-09 (1957). This Court should undertake to resolve the substantial and important issues presented on this Appeal.

Dated: July 14, 1978.

Respectfully submitted,

HARRISON W. HERTZBERG
Attorney for Appellants

HERTZBERG, KAPLAN & KOSLOW
Of Counsel

(PROOF OF SERVICE BY MAIL - 1013, 1013a C.C.P. (2), 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY MAIL
BY ATTORNEY

I, HARRISON W. HERTZBERG, being first duly sworn, say that I am and was at all times herein mentioned a citizen of the United States, and over the age of 18 years; I further say that I am an active member of the State Bar of California and of this Court, counsel in this cause, and not a party thereto.

My business address is 3550 Wilshire Boulevard, Suite 1418, Los Angeles, California 90010.

That on July 14, 1978, I served the within REPLY TO MOTION TO DISMISS OR AFFIRM on the interested parties in said action by placing three copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at 3550 Wilshire Boulevard, Los Angeles, California 90010 addressed as follows:

Attorney General Evelle J. Younger, Michael R. Botwin, Deputy Attorney General, 3580 Wilshire Boulevard, Los Angeles, CA 90010;

Court of Appeal, Second Appellate District, 3580 Wilshire Boulevard, Room 301, Los Angeles, CA 90010;

California State Supreme Court,
3580 Wilshire Boulevard, Los
Angeles, CA 90010;

HARRISON W. HERTZBERG

Subscribed and sworn to
before me this 14th da
of July, 1978.

OFFICIAL SEAL
MINA QUEZADA
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 27, 1981

Notary Public in and for
said County and State.